APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JULY 7, 1999

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the seventh day of July one thousand nine hundred and ninety-nine.

Present: HONORABLE AMALYA L. KEARSE,

HONORABLE CHESTER J. STRAUB,

HONORABLE ROSEMARY S. POOLER,

Circuit Judges.

No. 98-4350

EDWARD M. DUMANIS, NADYA DUMANIS

Petitioners-Appellants,

– v. –

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

* * *

Appendix A

Appeal from the Tax Court of the United States.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said Tax Court be and it hereby is affirmed.

Petitioners Edward Dumanis ("Dumanis") and Nadya Dumanis appeal from a judgment of the United States Tax Court, following a trial before Robert N. Armen, Jr., *Special Trial Judge*, upholding deficiencies determined by respondent Commissioner of Internal Revenue ("Commissioner") with respect to petitioners' 1993 and 1994 income tax returns. In their main brief on this appeal, petitioners, who proceeded *pro se* in the tax court and are represented by counsel in this Court, argue only that the tax court was biased against them and failed to afford them, as *pro se* litigants, a fair trial. In their reply brief, petitioners challenge the merits of the tax court decision. For the reasons that follow, we find no basis for reversal.

Our review of the record persuades us that petitioners' challenge to the fairness of the proceedings below is without merit. We see no basis for inferring that the tax court judge was biased against petitioners. For example, some of the colloquy quoted by petitioners in support of their contention that the tax court refused to allow them to be heard are plainly, when read in context, instances in which the court had asked a specific question and Dumanis commenced a statement that was not responsive. The court's effort to elicit

responsive answers is not evidence of bias. Further, the right of *pro se* litigants to be heard does not imply a right to oral argument on all legal questions. *See, e.g., Greene v. WCI Holdings Corp.*, 136 F.3d 313, 316 (2d Cir.) (per curiam), *cert. denied*, 119 S. Ct. 448 (1998). The record does not support the proposition that the tax court refused to allow petitioners to present necessary arguments that were properly proffered.

As to petitioners' opportunity to present evidence, a *pro se* litigant, no less than a counseled litigant, "must follow the applicable evidentiary rules and lay the proper foundation for the admission of his documents into evidence, including calling all relevant witnesses." *Moretti v. Commissioner*, 77 F.3d 637, 645 (2d Cir. 1996). *Pro se* litigants are equally bound by disclosure requirements, and where the litigant fails to comply with such requirements, the court may prevent him from presenting evidence at trial. *See id.* at 641, 644 (pre-trial order requiring parties to exchange documents before trial enforceable despite petitioner's claim that evidence "had only recently been obtained"). In the present case, it is undisputed that petitioners failed to comply with a pretrial order that "[a]ny documents or materials which a party expects to utilize in the event of trial (except for impeachment), but which are not stipulated, shall be identified in writing and exchanged by the parties at least 15 days before the first day of the trial session." That order also stated that "[t]he Court may refuse to receive in evidence any document or material not so stipulated or exchanged, unless otherwise agreed by the parties or allowed by the Court for good cause shown." Although petitioners contend here that the enforcement of this order denied them a fair trial

because they were confused as to whether they were required to exchange documents that were in the Commissioner's file or that they had shown to the auditor, they offered various other explanations in the tax court, stating principally that they had spent the bulk of their time preparing to show that the notice of deficiency was arbitrary and capricious, and that "when [Dumanis] found all the papers and w[as] able to make a presentation of [that] issue, there was no time to do through [*sic*] the presentation of the material to exchange with the Respondent the materials . . . ." Further, notwithstanding petitioners' failure to provide the required 15 days' advance notice to the Commissioner of the documents they would offer at trial, and notwithstanding their failure to proffer a good reason for their failure, the tax court indicated that it would allow petitioners to introduce such documents as counsel for the Commissioner had already seen; petitioners do not dispute that they had in their possession at trial a copy of the Commissioner's entire administrative file. Thus, the tax court offered to excuse petitioners' default in part. To the extent that the tax court otherwise enforced the pretrial order, it did not deny petitioners a fair trial.

In their reply brief, petitioners for the first time challenge the merits of the tax court's decision. This challenge is not properly before us, as an appellant is required to set out "a statement of the issues presented for review," Fed. R. App. P. 28(a)(5), and the "appellant's contentions and the reasons for them," *id.* 28(a)(9)(A), in his main brief. A challenge may not be made for the first time in the appellant's reply brief. *See, e.g., Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993).

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We have considered all of petitioners' contentions that are properly before us and have found in them no basis for reversal. The judgment of the tax court is affirmed.

FOR THE COURT:
KAREN GREVE MILTON,
Acting Clerk
by:

s/ Ralph A. Anderson
RALPH A. ANDERSON,
DEPUTY CLERK
ACTING OPERATIONS
MANAGER

APPENDIX B — DECISION DATED AND ENTERED MAY 12, 1998 AND TRANSCRIPT OF BENCH OPINION DATED APRIL 28, 1998 OF THE UNITED STATES TAX COURT

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 10681-97

EDWARD M. AND NADYA DUMANIS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its bench opinion rendered on April 28, 1998, at Buffalo, New York, it is

ORDERED AND DECIDED that there are deficiencies in petitioners' Federal income taxes for the taxable years 1993 and 1994 in the amounts of $1,740 and $1,148, respectively.

s/ Robert N. Armen, Jr.
Robert N. Armen, Jr.
Special Trial Judge

ENTERED: MAY 12 1998

Appendix B

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

May 12, 1998

Docket No. 10681-97

EDWARD M. AND NADYA DUMANIS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Notice of Service of Transcript

Pursuant to Rule 152(b), Rules of Practice and Procedure of this Court, there is transmitted herewith to petitioners and respondent a copy of the pages of the transcript of the trial of the above case before Special Trial Judge Robert N. Armen, Jr. at Buffalo, New York, on April 28, 1998, containing his oral findings of fact and opinion rendered at the conclusion of the trial.

In accordance with the oral findings of fact and opinion, decision will be entered for respondent.

s/ Charles S. Casazza
Charles S. Casazza
Clerk of the Court

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[commencing at page 3]

EDWARD M. & NADYA DUMANIS

DOCKET NO. 10681-97

APRIL 28, 1998

SPECIAL TRIAL JUDGE ROBERT N. ARMEN, JR.

BENCH OPINION

I.

THE COURT: The Court has decided to render oral findings of fact and opinion in this case, and the following represents the Court's oral findings of fact and opinion.

II.

This proceeding was heard as a regular case pursuant to the provisions of section 7443A(b)(3) of the Internal Revenue Code of 1986, as amended, and Rules 180, 181, and 182 of the Tax Court Rules of Practice and Procedure.

III.

This bench opinion is made pursuant to the authority granted by section 7459(b) of the Internal Revenue Code of 1986, as amended, and Rule 152 of the Tax Court Rules of Practice and Procedure.

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Hereinafter in this bench opinion, and unless otherwise stated, all section numbers refer to the Internal Revenue Code, as amended and in effect for 1993 and 1994, the taxable years in issue, and all Rule numbers refer to [4] the Tax Court Rules of Practice and Procedure.

IV.

Edward M. Dumanis and Nadya Dumanis appeared on their own behalf, and Matthew I. Root appeared on behalf of respondent.

V.

Respondent determined deficiencies in petitioners' Federal income taxes for the taxable years 1993 and 1994 in the amounts of $1,740 and $1,148, respectively.

VI.

For the sake of convenience, we shall henceforth refer to petitioner Edward M. Dumanis as petitioner.

VII.

The issues for decision, all of which involve Schedule C deductions claimed by petitioner on his 1993 and 1994 income tax returns, are as follows:

(1) Whether petitioner is entitled to a deduction for automobile expense as claimed on his Schedule C for each of the taxable years in issue;

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(2) whether petitioner is entitled to a deduction for rent as claimed on his Schedule C for each of the [5] taxable years in issue;

(3) whether petitioner is entitled to a deduction for meals while away from home as claimed on his Schedule C for each of the taxable years in issue; and

(4) whether petitioner is entitled to a deduction for utilities as claimed on his Schedule C for each of the taxable years in issue.

All of these issues essentially involve substantiation of the deductions claimed.

VIII.

The parties failed to execute a stipulation of facts. See Rule 91; see also Note to Rule 91, 60 T.C. at 1117 (the stipulation process is the "mainstay" of Tax Court practice); *Branerton Corp. v. Commissioner*, 61 T.C. 691, 692 (1974) (the stipulation process is the "bedrock" of Tax Court practice). However, with the Court's assistance, the parties did orally stipulate to venue, as well as to copies of the notice of deficiency and petitioners' income tax returns for the years in issue.

Petitioners resided in the State of New York at the time that their petition was filed with the Court.

During 1993 and 1994, and for several years prior thereto, petitioner was the sole proprietor of a communication

services business known as "Expert [6] Quality/Russian Translation Services". The principal place of business of petitioner's communication services business was 117 Callodine Avenue, Amherst, New York, which petitioner regards as his tax home.

Amherst, New York is a suburb of Buffalo, New York, and 117 Callodine Avenue is a single-family residence that petitioners have owned since 1987. Petitioners listed 117 Callodine Avenue both as their home address on Form 1040 for 1993 and 1994 and as petitioner's business address on Schedule C for 1993 and 1994.

In March 1991, petitioner filed a business certificate with the clerk of Erie County, New York, the county that includes Amherst. The business certificate stated that petitioner was conducting business at 117 Callodine Avenue and that he also resided at such address.

In March 1991, petitioner Nadya Dumanis commenced employment in Rochester, New York as a computer programmer for Eastman Kodak Company. Petitioner Nadya Dumanis worked in this capacity on a full-time basis during 1993 and 1994.

At or about the time petitioner Nadya Dumanis commenced employment in Rochester with Eastman Kodak Company, she and/or petitioner leased a one-bedroom apartment with an address at 176 Greystone Lane, Apt. #3, Rochester, New York. This apartment, consisting of a living room, bedroom, and kitchen, was situated on the first floor [7] of a two-story garden-style apartment building, which,

in turn, was part of a residential apartment complex. Petitioner Nadya Dumanis and/or petitioner continued to lease this apartment through mid-1993. During this period, and in particular in 1993, there was use of this apartment as a residence by petitioner Nadya Dumanis and/or petitioner.

In or about July 1993, petitioner Nadya Dumanis and/or petitioner leased a two-bedroom apartment with an address at 2337 East Ridge Road, Apt. #17, Rochester, New York. This apartment, consisting of a living room, two bedrooms, and kitchen, was also situated on the first floor of a garden-style apartment building, which, in turn, was part of a residential apartment complex. During the last six months of 1993 and during 1994, there was use of this apartment as a residence by petitioner Nadya Dumanis and/or petitioner.

In April 1991, shortly after petitioner Nadya Dumanis had commenced employment in Rochester, New York, petitioner filed business certificates with the clerk of Monroe County, New York, the county that includes Rochester. The business certificates stated that petitioner was conducting business at 176 Greystone Lane #3 and that he also resided at such address.

In July 1993, petitioner filed amended business [8] certificates with the clerk of Monroe County, New York. The business certificates stated that petitioner was conducting business at 2337 East Ridge Road #17 and that he also resided at such address.

Petitioner Nadya Dumanis received a Form W-2 (Wage and Tax Statement) from her employer, Eastman Kodak

Company, for each of the years in issue. The Form W-2 for 1993 discloses petitioner Nadya Dumanis' address as 2337 East Ridge Road, Apt. #17, Rochester, New York. The Form W-2 for 1994 also discloses petitioner Nadya Dumanis' address as 2337 East Ridge Road, Apt. #17.

On their 1993 income tax return, petitioners reported wages received by petitioner Nadya Dumanis from Eastman Kodak Company in the amount of $52,077. In contrast, on Schedule C, petitioner claimed a loss from his communication services business in the amount of $10,224.

Similarly, on their 1994 income tax return, petitioners reported wages received by petitioner Nadya Dumanis from Eastman Kodak Company in the amount of $53,642. In contrast, on Schedule C, petitioner claimed a loss from his communication services business in the amount of $8,405.

Petitioner's Schedule C loss for 1993 was the arithmetic difference between total expenses claimed in the amount of $16,183 and gross income reported in the amount of $5,959. Expenses claimed included deductions for [9] depreciation in the amount of $5,821, rent in the amount of $2,940, meals (after the applicable 20 percent limitation) in the amount of $1,664; and utilities in the amount of $4,948. There was also an expense claimed for advertising in the amount of $81.60.

The deduction for depreciation included two components: (1) a section 179 expense deduction for software and a laser jet fax machine in the total amount of $1,013 and (2) business mileage in the amount of $4,809. The latter component was based on the standard mileage rate of $.28 per business mile

driven times 17,174 business miles. All or some portion of the 17,174 figure apparently represents mileage between Buffalo and Rochester.

The deduction for rent in the amount of $2,940 apparently represents all or some portion of the monthly rent paid for apartment #3 at 176 Greystone Lane and apartment #17 at 2337 East Ridge Road in Rochester.

All or some portion of the deduction for meals in the net amount of $1,664 apparently represents the costs of meals eaten by petitioner in Rochester while away from home overnight.

The deduction for utilities in the amount of $4,948 apparently represents the cost of all or some portion of the utilities (gas, electric, and telephone) applicable to the business use of 117 Callodine Avenue in Amherst, [10] i.e., $3,388, and the alleged business use of apartment #3 at 176 Greystone Lane and apartment #17 at 2337 East Ridge Road in Rochester, i.e., $1,560.

Petitioner's Schedule C loss for 1994 was the arithmetic difference between total expenses claimed in the amount of $12,785 and gross income reported in the amount of $4,380. Expenses claimed included deductions for depreciation in the amount of $3,759, rent in the amount of $2,007, meals (after the applicable 50 percent limitation) in the amount of $1,114; and utilities in the amount of $4,998.

The deduction for depreciation included two components: (1) a section 179 expense deduction for computer and office

accessories in the total amount of $828 and (2) business mileage in the amount of $2,932. The latter component was based on the standard mileage rate of $.29 per business mile driven times 10,109 business miles. All or some portion of the 10,109 figure apparently represents mileage between Buffalo and Rochester.

The deduction for rent in the amount of $2,007 apparently represents all or some portion of the monthly rent paid for apartment #17 at 2337 East Ridge Road in Rochester.

All or some portion of the deduction for meals in the net amount of $1,114 apparently represents the costs of [11] meals eaten by petitioner while away from home overnight.

The deduction for utilities in the amount of $4,998 apparently represents the cost of all or some portion of the utilities (gas, electric, and telephone) applicable to the business use of 117 Callodine Avenue in Amherst, i.e., $3,424, and the alleged business use of apartment #17 at 2337 East Ridge Road in Rochester, i.e., $1,574.

In the notice of deficiency, respondent disallowed in full (1) the business mileage component of the depreciation deduction claimed by petitioner on his Schedule C for 1993 and 1994; (2) the rent deduction claimed by petitioner on his Schedule C for 1993 and 1994; (3) the deduction for meals claimed by petitioner on his Schedule C for 1993 and 1994; and (4) that part of the deduction for utilities applicable to the apartments in Rochester claimed by petitioner on his Schedule C for 1993 and 1994. (Parenthetically, we note that in the notice of deficiency, respondent appears to have made

an $8 error in petitioners' favor in disallowing the business mileage component of the depreciation deduction claimed by petitioner on his Schedule C for 1993.)

Before turning to the applicable law, we conclude our findings of fact with the following:

Prior to her employment in Rochester in March 1991 with Eastman Kodak Company, petitioner Nadya Dumanis worked [12] in Detroit, Michigan for Analytical Technologies, Inc. During that period, she and/or petitioner leased an apartment in the Detroit metropolitan area. Also during that period, petitioner purported to conduct his communication services business from that apartment, while continuing to regard Amherst, New York as his tax home. Petitioner also reported losses from his business during that period.

IX.

We turn now to three fundamental principles of tax litigation that guide the decisional process in this case.

First, as a general rule, the Commissioner's determinations are presumed correct, and the taxpayer bears the burden of proving that those determinations are erroneous. Rule 142(a). This principle was firmly established by the United States Supreme Court as early as 1933 and has been reaffirmed by the Supreme Court as recently as 1992. See *INDOPCO Inc. v. Commissioner*, 503 U.S. 79, 84 (1992); *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

Second, deductions are a matter of legislative grace, and a taxpayer must satisfy the specific statutory requirements of the deduction claimed. *Deputy v. duPont*, 308 U.S. 488, 493 (1940); *New Colonial Ice Co. v. Helvering*, [13] 292 U.S. 435, 440 (1934). Additionally, a taxpayer is required to substantiate the amount claimed as a deduction by maintaining the records needed to establish such entitlement. See generally sec. 6001; sec. 1.6001-1(a), Income Tax Regs.; *Hradesky v. Commissioner*, 65 T.C. 87, 90 (1975), affd. per curiam 540 F.2d 821 (5th Cir. 1976); see also section 274(d), which sets forth particularly stringent substantiation requirements in the case of travel expense, including meals while away from home, and expenses involving listed property, such as automobiles. We will have more to say about section 274 in a few moments.

Third, the Court is not bound to accept as gospel the unverified and undocumented testimony of a taxpayer. *Hradesky v. Commissioner*, supra; *Tokarski v. Commissioner*, 87 T.C. 74, 77 (1986). Even when a taxpayer's testimony is uncontroverted, we are not required to accept it if it is improbable, unreasonable, or questionable. *Lovell & Hart, Inc. v. Commissioner*, 456 F.2d 145, 148 (6th Cir. 1972), affg. T.C. Memo. 1970-335; *MacGuire v. Commissioner*, 450 F.2d 1239, 1244 (5th Cir. 1971), affg. T.C. Memo. 1970-89; *Niedringhaus v. Commissioner*, 99 T.C. 202, 212 (1992). See *Diaz v. Commissioner*, 58 T.C. 560, 562 (1972) (distilling truth from the testimony of witnesses, whose demeanor we observe and whose credibility we evaluate, is the daily grist of judicial life); see also *Gerardo v. Commissioner*, [14] 552 F.2d 549, 553 (3d Cir. 1977); *Wood v. Commissioner*, 338 F.2d 602 (9th Cir. 1964), affg. 41 T.C. 593 (1964).

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We turn now to the deductions claimed by petitioner on his Schedule C's. We begin with the deductions claimed for automobile expense and meals.

As a general rule, if the record provides sufficient evidence that the taxpayer has incurred a deductible expense, but the taxpayer is unable to adequately substantiate the amount of the deduction to which he or she is otherwise entitled, the Court may estimate the amount of such expense and allow the deduction to that extent. *Cohan v. Commissioner*, 39 F.2d 540, 543-544 (2d Cir. 1930). However, in order for the Court to estimate the amount of an expense, we must have some basis upon which an estimate may be made. *Vanicek v. Commissioner*, 85 T.C. 731, 743 (1985). Without such a basis, any allowance would amount to unguided largesse. *Williams v. United States*, 245 F.2d 559, 560 (5th Cir. 1957).

However, in the case of certain expenses, section 274(d) overrides the so-called *Cohan* doctrine. *Sanford v. Commissioner*, 50 T.C. 823, 827 (1968), affd. per curiam 412 F.2d 201 (2d Cir. 1969); sec. 1.274-5T(a), Temporary Income Tax Regs. Specifically, section 274(d)(1) and (4) provides that no deduction is allowable for travel, including meals while away from home, and with respect to listed property as [15] defined in section 280F(d)(4), unless the deductions are substantiated in accordance with the strict substantiation requirements of section 274(d) and the regulations promulgated thereunder. Included in the definition of listed property in section 280F(d)(4) is any passenger automobile. Sec. 280F(d)(4)(A)(I).

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In order to substantiate a deduction for travel, including meals while away from home, or a deduction attributable to listed property, a taxpayer must maintain adequate records or present corroborative evidence to show: (1) The amount of the expense, (2) the time and place of travel or use of the listed property, and (3) the business purpose for the travel or use. Sec. 1.274-5T(b)(6), Temporary Income Tax Regs.

In order to substantiate a deduction by means of adequate records, a taxpayer must maintain a diary, a log, or a similar record, and documentary evidence which, in combination, are sufficient to establish each element of each expenditure or use. Sec. 1.274-5T(c)(2)(I), Temporary Income Tax Regs. To be adequate, a record must generally be written. Each element of an expenditure or use that must be substantiated should be recorded at or near the time of that expenditure or use. Sec. 1.274-5T(c)(2)(ii)(A), Temporary Income Tax Regs.

Thus, under section 274(d), no deduction may be [16] allowed for travel, including meals while away from home, or expenses incurred for use of a passenger automobile on the basis of any approximation or the unsupported testimony of the taxpayer. E.g., *Golden v. Commissioner*, T.C. Memo. 1993-602.

Petitioner has not complied with the strict substantiation requirements of section 274 insofar as his deductions for automobile and meal expenses are concerned. Indeed, petitioner presented no records at trial regarding either automobile expense or meal expense, and it is unclear from the trial record whether petitioner even maintained the type of records required by section 274.

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Insofar as automobile expense is concerned, petitioner testified that he subtracted the odometer reading at the beginning of the year from the odometer reading at the end of the year and then multiplied the difference by the standard mileage rate. Petitioner testified further that his automobile was used exclusively for business and that there was no personal use of such automobile whatsoever. We do not find this testimony convincing and we do not accept it. Regardless, petitioner's approach does not comport with the strict substantiation requirements of section 274.

Insofar as meal expense is concerned, petitioner testified that he used the Federal meal rate for the [17] locality of his travel and then multiplied that rate on a quarter-day basis times the number of quarter-days that he was away from his tax home in Buffalo overnight. Although use of the Federal meal rate may be appropriate, the trial record in this case does not establish either the time and place of travel or the business purpose for such travel. Once again, the strict substantiation requirements of section 274 have not been satisfied.

We turn now to the deductions claimed for rent and utilities. These deductions relate to apartment #3 at 176 Greystone Lane and apartment #17 at 2337 East Ridge Road in Rochester.

At trial, petitioner testified that the Rochester apartments were leased "primarily" for business use; nevertheless, petitioner testified that only one-half of the expenses actually incurred were deducted. We regard petitioner's testimony as an admission that there was personal use of the Rochester apartments.

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We begin by observing that the trial record is devoid of any documentary evidence regarding amounts actually paid for rent and utilities for the Rochester apartments. Indeed, there is nothing in the trial record regarding payment, except for the claims made on petitioner's Schedule C's themselves. However, petitioners' returns are not self-proving as to the truth of their [18] contents. E.g., *Halle v. Commissioner*, 7 T.C. 245 (1946), affd. 175 F.2d 500 (2d Cir. 1949); *Caruso v. Commissioner*, T.C. Memo. 1966-190. Apart from the foregoing, section 280A(a) denies deductions with respect to the use of a dwelling unit used by the taxpayer as a residence during the taxable year. Section 280A(c), however, permits the deduction of expenses allocable to a portion of the dwelling unit that is used exclusively and on a regular basis as "the principal place of business" for any trade or business of the taxpayer, sec. 280A(c)(1)(A), or as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of the taxpayer's trade or business, sec. 280A(c)(1)(B). The first of these exceptions does not apply because petitioner's principal place of business was 117 Callodine Avenue in Amherst. And petitioners failed to prove that the second of these exceptions applied, i.e., petitioners failed to prove that the Rochester apartments were used by clients or customers in meeting or dealing with petitioner in the normal course of petitioner's communication services business.

Even if one of the exceptions set forth in section 280A(c)(1) were applicable, petitioners failed to prove that the limitation of section 280A(c)(5) does not bar the deductions in issue. Specifically, petitioners failed to [19] prove the amount of gross income derived from the use of the Rochester apartments for either of the years in issue.

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Insofar as telephone expense is concerned, we observe that the trial record contains no evidence whatsoever of the amount actually paid for telephone service or advertising in the Yellow pages. (Parenthetically, we note that a deduction for advertising in the amount of $81.60 was specifically claimed on petitioner's Schedule C for 1993.) Moreover, section 262(b) provides that the charges for basic local telephone service with respect to the first line provided to any residence shall be treated as a nondeductible personal expense. See also *Williams v. United States*, supra; *Vanicek v. Commissioner*, supra.

In addition to the various technical reasons that preclude petitioners' entitlement to all of the deductions in issue, i.e., the deductions for automobile expense, meals while away from home, rent, and utilities in respect of the Rochester apartments, there is yet another fundamental hurdle that petitioners have failed to clear. Simply put, petitioners have failed to convince us that Rochester was anything more than the place of employment of petitioner Nadya Dumanis. In other words, petitioners have failed to prove that there was a nexus between Rochester and petitioner's communication services business.

At trial, petitioner admitted that before March [20] 1991, i.e., before petitioner Nadya Dumanis secured employment in Rochester with Eastman Kodak Company, petitioner had only "infrequent" business contacts with Rochester. We suspect that the truth is closer to "virtually no" or "no" such business contacts. Regardless, petitioner never convincingly explained what, from a business point of view, drew him first to Detroit and then to Rochester. The pattern suggested

by the record is that petitioner, whose residence and principal place of business at all relevant times was in Amherst, would establish a "satellite office" in the residential apartment maintained by petitioner Nadya Dumanis, the individual responsible for the family unit's economic well-being, wherever she obtained gainful employment. Further, petitioner never convincingly explained why he would lease a residential apartment in a residential apartment complex rather than office space in an office building.

The suggestion that lingers in the trial record is that petitioners wished to convert personal expense into ostensible business expense. This suggestion, which fundamentally underlies respondent's deficiency determinations, was never overcome by petitioners at trial.

Finally, in closing, we again observe that this is basically a substantiation case. Unfortunately, petitioners failed to produce the requisite proof. With regard to [21] documentary evidence in particular, petitioners introduced only one exhibit, a computer-generated "toll report". This exhibit appears to relate to a deduction not even disallowed by respondent, given the fact that the deductions for automobile expense previously discussed were based solely on the standard mileage rate. In any event, the document does not serve to substantiate any deduction at issue in this case.

In view of the foregoing, we hold that petitioners failed to carry their burden of proof, and we therefore sustain respondent's deficiency determinations. Rule 142(a); *INDOPCO Inc. v. Commissioner*, supra; *Welch v. Helvering*, supra.

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X.

In order to give effect to the foregoing, decision will be entered for respondent.

XI.

This concludes the Court's oral findings of fact and opinion in this case.

[22] [Whereupon, at 12:15 p.m., the bench opinion concluded.]

* * * *

APPENDIX C — ORDER OF THE UNITED STATES TAX COURT DATED AUGUST 12, 1998

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 10681-97

EDWARD M. AND NADYA DUMANIS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

On June 11, 1998, petitioners filed a Motion to Vacate Decision. On July 1, 1998, petitioners filed a Motion for Reconsideration of Opinion after the Court granted their motion for leave to file such motion out of time.

On August 3, 1998, respondent filed a Notice of Objection to petitioners' motion to vacate and motion for reconsideration.

I.

The granting of a post-decision motion, such as a motion for reconsideration or a motion to vacate, rests within the discretion of the Court, and we will not exercise our

discretion absent a showing of unusual circumstances or substantial error of fact or law. E.g., *Vaughn v. Commissioner*, 87 T.C. 164, 166-167 (1986); *Estate of Bailly v. Commissioner*, 81 T.C. 949, 951 (1983); *CWT Farms, Inc. v. Commissioner*, 79 T.C. 1054, 1057 (1982), affd. 755 F.2d 790 (11th Cir. 1985); *Estate of Scanlan v. Commissioner*, T.C. Memo. 1996-414, affd. without published opinion 116 F.3d 1476 (5th Cir. 1997); *Gilman v. Commissioner*, T.C. Memo. 1990-205, affd. 933 F.2d 143 (2nd Cir. 1991). It is the policy of the Court to try all issues raised in a case in one proceeding in order to avoid piecemeal and protracted litigation. *Robin Haft Trust v. Commissioner*, 62 T.C. 145, 147 (1974), affd. on this issue 510 F.2d 43, 45 n.1 (1st Cir. 1975). A post-decision motion will generally not be granted in order to resolve issues that could have been raised during the prior proceeding but are raised instead for the first time in a post-decision motion. E.g., *Stoody v. Commissioner*, 67 T.C. 643, 644 (1977). As we stated in *Koufman v. Commissioner*, 69 T.C. 473, 476-477 (1977):

> This Court has an extraordinarily heavy volume of cases, and in many of them, the Court decides an issue against one of the parties because of his failure to carry his burden of proof or to perform some other act. If the Court granted a second chance to every party who lost because of his failure to act in some manner, the Court clearly could not keep abreast of its work. In effect, we would be telling the parties that if they were not satisfied with the first decision, try again. However, on previous occasions, we have denied a petitioner's motion to vacate the decision and

> reconsider the opinion where the only basis for these motions was the petitioner's unexcused failure to raise certain issues earlier.

Similarly, in *Selwyn Operating Corp. v. Commissioner*, 11 B.T.A. 593, 595 (1928), we observed:

> A party is entitled to have his day in court; both parties are entitled to this, but neither party is entitled to have more than one fair, reasonable opportunity to establish his claim or defense. To allow more would be to protract litigation to the extent which would preclude the administration of justice.

In other words, a party may not try his case with hindsight. *Long v. Commissioner*, 71 T.C. 724, 727 (1979), remanded on another issue 660 F.2d 416 (10th Cir. 1981).

II.

In their motion to vacate, petitioners take issue with the Court's enforcement of the standing pretrial order. Petitioners also allege violation of their Constitutional rights.

Our standing pretrial order, which was served on petitioners on February 4, 1998, requires, inter alia, that any documents or materials that a party expects to use at trial (except for impeachment), but which are not stipulated, be identified in writing and exchanged by the parties at least 15 days before the first day of the trial session. Materials that are not provided in compliance with our standing pretrial

order may be excluded from evidence. Rules 104(c)(2), 131(b) (formerly 132(b)); *Moretti v. Commissioner*, 77 F.3d 637, 644 (2d Cir. 1996); *Schaefer v. Commissioner*, T.C. Memo. 1998-163; *Polentarutti v. Commissioner*, T.C. Memo. 1998-113; *Kodak v. Commissioner*, T.C. Memo. 1991-485, affd. without published opinion 14 F.3d 47 (3d Cir. 1993). See Rule 143(b); *Owens v. Commissioner*, T.C. Memo. 1997-538, regarding an improper attempt to introduce evidence after the record has closed.

At the trial on Monday, April 27, 1998, the Court enforced its standing pretrial order when petitioners attempted to introduce into evidence materials that had not been provided in compliance with such order and after petitioners failed to establish good cause for such failure. As to petitioners' reason for failure to abide by the Court's pretrial order, we refer to the following excerpt from the trial transcript:

> THE COURT: * * * Now, have all of these receipts, Mr. Dumanis, been made available to Mr. Root?
>
> WITNESS MR. DUMANIS: Mr. Root just saw those receipts, the receipts themselves this morning when he just looked through them, but they were not given to him in advance for 15 day notice because my problem was that I didn't know what I should bring because I have just an enormous amount of different papers, and I was to supply any specific request with this regard, but I just couldn't know what I could bring.

Such reasoning does not constitute good cause for petitioners' failure to abide by our pretrial order. Although this Court provides pro se litigants some latitude in prosecuting their cases, we cannot allow such litigants to completely disregard the rules of practice and procedure established by this Court. Petitioners' case was set for trial two and a half months in advance. At that time, petitioners received the pretrial order and became aware of its requirements. Under these circumstances, even a pro se litigant cannot circumvent the good cause requirement for the reason that "I have just an enormous amount of different papers, and I was to supply any specific request with this regard, but I just couldn't know what I could bring."

Further, although we may be more lenient regarding what may constitute good cause for failure to abide by our pretrial order in the case of pro se litigants, we cannot allow such litigants by what appears to be bad faith or willful action, to prejudice respondent's case or disrupt the orderly and efficient trial of the case. See *Rapco, Inc. v. Commissioner*, 85 F.3d 950 (2nd Cir. 1996), affg. T.C. Memo. 1995-128. In this regard, we observe that petitioners did not simply attempt to produce a few pieces of evidence that they became aware of, through no fault of their own, at the last minute. Rather, petitioners sought to introduce a folder-full of hundreds of receipts that had apparently been in their possession all along. Petitioners did not provide respondent with this evidence until the morning of the trial. Respondent had no time to establish whether the receipts were authentic, incurred in relation to the businesses in question, or even to add them up. Obviously, petitioners' last minute introduction of such evidence would be prejudicial to respondent. Further,

petitioners' action also would disrupt the orderly and efficient trial of the case. It would take hours of the Court's time at trial to sort through, establish authenticity, determine admissibility, or add-up the receipts in question.

We addressed this Court's reasoning for enforcing the standing pretrial order in length at trial. The following excerpt from the trial transcript is illustrative of the rationale for our ruling:

> THE COURT: Mr. Dumanis, when this case was set for trial, the Court issued a trial notice, attached to which was a standing pre-trial order. And that order includes a number of directives to the parties, and those directives are set forth in our order for good reason. They are designed to insure that the parties cooperate fully in advance of trial in an effort to hopefully settle the case, but if the case cannot be settled, to get the case in shape so it can be properly presented to the Court.
>
> Now, one of the directives set forth in our standing pre-trial order is a requirement that the parties stipulate facts to the maximum extent possible and that the parties stipulate all documentary evidence, or at the very least, if there is some evidentiary problem why a [party] cannot stipulate all documentary evidence, that all documentary evidence be exchanged between the parties in advance of trial.
>
> And we do that for — we require this for several reasons. First of all, we require it because

of fundamental fairness so that each side has an opportunity to look at the other side's documents and consider them and be prepared for trial.

We also do it in the hopes that, with full disclosure, the parties are able to settle their case, as happens most of the time.

And, thirdly, we do it because the Court is simply not going to conduct an audit in the courtroom, that is not the purpose of a trial.

So our standing pre-trial order requires that the parties either stipulate all documentary evidence or, at the very least, exchange all documentary evidence at least 15 days before the date of trial. This, again, is done for the reasons that we have just indicated.

Now, our order is very clear, it provides, quote, "The Court may refuse to receive in evidence any document or material not so stipulated or exchanged unless otherwise agreed by the parties or allowed by the Court for a good cause show[n]." Close quote.

Now, you have just handed us a folder of receipts that, by our rough estimation, consists of approximately 300 receipts. Now, we are not going to sit here and go through 300 receipts.

MR. DUMANIS: Your Honor, may I say —

Appendix C

> THE COURT: And you have told us that the first time you made this available to [respondent's counsel] was this morning.
>
> MR. DUMANIS: That's correct. * * *

After review of the record, we adhere to our ruling at trial.

Petitioners also allege violation of their Constitutional rights. In this regard, petitioners contend that the notice of deficiency was arbitrary and capricious and that the audit was inadequately conducted.

At trial, we specifically addressed petitioners' contention regarding the notice of deficiency. We analyzed the notice of deficiency and explained to petitioners that this case basically involved substantiation:

> THE COURT: * * * Now, what you need to do here today is to demonstrate that these various expenses were in fact incurred by you, were paid by you, and that there was a business underlying these expenses. * * *

At trial, we ruled that the notice of deficiency was neither arbitrary nor capricious. After review of the record, we adhere to that ruling.

We also observe that a trial in this Court is not based on an administrative record but rather is a de novo proceeding. Accordingly, our redetermination of a taxpayer's liability is

based upon the record presented to us. For that reason, this Court generally will not look behind a notice of deficiency to examine evidence used or the propriety of the Commissioner's motives, or the administrative policy or procedures involved in making the Commissioner's determination. *Riland v. Commissioner*, 79 T.C. 185, 201 (1982); *Greenberg's Express, Inc. v. Commissioner*, 62 T.C. 324, 327 (1974). Petitioners have not provided us with any persuasive reason to depart from this approach. Suffice it to say that by commencing the present case, petitioners have precluded respondent from assessing or collecting any deficiency in income tax until the decision of this Court has become final. Sec. 6213(a). See sec. 7485(a), (c).

III.

In their motion for reconsideration, petitioners essentially dispute a number of the Court's findings of fact and conclusions of law as set forth in the Court's bench opinion rendered on April 28, 1998. After review of the record, we adhere to our findings and conclusions. In so doing, we refer to paragraphs 7 through 25 of respondent's Notice of Objection to petitioners' motion for reconsideration, which substantially address most, if not all, of petitioners' objections.

Appendix C

IV.

Based on the foregoing, it is hereby

ORDERED that petitioners' Motion to Vacate Decision, filed June 11, 1998, and petitioners' Motion for Reconsideration of Opinion, filed July 1, 1998, are both denied.

s/ Robert N. Armen, Jr.
Robert N. Armen, Jr.
Special Trial Judge

Dated: Washington, D.C.
August 12, 1998

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 4, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th Day of February, two thousand.

Dkt No: 98-4350

Dumanis

v

CIR

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

Appendix D

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney